Petitioner filed a motion for rehearing, but, notwithstanding the *Heintz* decision, the county court denied the motion.

Petitioner next filed a combined motion for protective order and stay so that he could appeal the county court decision. The basis for this motion was that the remedy Petitioner was seeking –not having to submit to questions posed to him by the attorney debt collector in light of Petitioner's previously communicated "stop communications" demand – would be lost if Petitioner did not have a stay and therefore had to submit to the deposition while the appeal was being decided.

Before the stay motion was heard and while it was in the court file, the collector obtained a certificate of non-appearance by the court reporter and then filed with the county court a motion for sanctions because Petitioner did not appear at the scheduled deposition. Petitioner believed the unheard motion for protective orders and stay of the court's decision automatically had stayed the noticed depositions until the motions were heard or decided by the court. Trawick, *Florida Practice and Procedure*, section 16-12, protective orders, supports the notion[3]. The county court judge, notwithstanding Petitioner's motion for protective order and stay in the file, issued a civil sanctions order compelling Petitioner to jail if he did not submit to the deposition in aid of execution and pay the collector attorney's fees and costs within 60 days. Petitioner, in response, filed for federal Bankruptcy protection under Chapter 7 and obtained, finally and by operation of the federal bankruptcy law, an automatic stay of the deposition from the federal bankruptcy court. The deposition, and invasion of

3. The attorney debt collector testified at the refereed hearing on the Bar Complaint against the Petitioner that he believed that Petitioner believed that the motions in the court file stayed the depositions until the motions were heard. See transcript of refereed final hearing on 8-9 Jan 2004, pp. 128-130. The Circuit judge acting as referee in this case stated that he too believed that such motions stayed the taking of the depositions. See transcript of refereed final hearing on 8-9 Jan 2004, pp. 144-145, 200 (page 200 quotes section 16-12 of the Trawick treatise).

Petitioner's privacy, wanted by the collector never happened. Section 1692(a) of the FDCPA mentions abusive debt collection practices as a contributing factor causing invasions of privacy and personal bankruptcy filings.

Later, when the U.S. District Court was making its Rule 11 decision based on Petitioner's FDCPA claims later filed in U.S. District Court against the collector, the District Court negatively referred to Petitioner's motion conduct in the county court and judged that his county court actions or motions there were frivolous notwithstanding that the county judge never made any such ruling or any ruling akin to judging Petitioner's actions in his court to be frivolous. That is, the U.S. District Court judge found Petitioner's filings in the county court frivolous even though he was not the judge in that case nor even a member of the judiciary of the State of Florida. He was acting outside of his jurisdiction. *See* page 11 of U.S. Circuit Judge's order dated 15 June 2001 and granting Stephen M. Guttmann's motion for summary judgment (Doc. 57 in that case):

> Moreover, in light of his conduct in the state court proceeding and the fact that he filed two actions before this court that raised *the same frivolous claims*, it appears that Committee's intent in filing this action was to harass the defendant. Thus, it appears that this case was brought in bad faith and in violation of Rule 11. [Emphasis added].

Furthermore, the FDCPA claims raised in the U.S. District Court were not the same as the claims raised in the state county court. The two sets of claims were based on completely different facts as the section immediately below reveals.

When Petitioner raised the above point of error in his motion for new trial (in substance a motion for reconsideration) in the U.S. District Court, the trial judge withdrew his reference to Petitioner's conduct in the county court as the basis for his Rule 11 decision but did not otherwise change his decision.

*See* Order on motion for new trial dated 18 December 2001, last page, footnote 4 (Doc 64 in that case).

### *II. Petitioner's Conduct in the U.S. District Court*

Within two weeks of the FDCPA's one year period of limitations for bringing an action expiring, Petitioner brought a four count civil complaint against the attorney debt collector Stephen M. Guttmann in the U.S. District Court for the Northern District of Florida, Pensacola Division. This is the "later" case referenced above. The complaint alleged other FDCPA wrongdoing (other than that which was raised in county court[4]) by the collector as well as alleged a violation of the FCCPA (Florida Consumer Collection Practices Act) based on the conduct which underlain the alleged FDCPA violations.[5] This alleged conduct was that the collector had violated (1) 15 U.S.C. § 1692c(c) by commencing, and engaging Petitioner in, debt

4. The assertion stated by the Florida Supreme Court in its order here being sought for review that Petitioner raised the same issues in U.S. District Court, Case No. 3:99cv426/RV, that he raised in the county court (see pet. App. 12a; 13a; 16a) is patently not warranted by the facts in the case. The factual matter or issue of the attorney debt collector attempting to take Petitioner's deposition after the collector had been served with a "stop communications" demand was not alleged in the complaints filed by Petitioner in the U.S. District Court. This is obvious on the face of the complaint filed in U.S. District Court, Case No.3:99cv426/RV.

5. At the time, the FCCPA did not have any limitation on punitive damages (although other Florida tort reform statutes may have limited such to three times actual damages – the matter was arguable as a conflict between a general and narrowly designed statute) as does the FDCPA. Too, the FCCPA required a successful defendant to prove that the suit raised no justiciable issue of law or fact before attorney fees could be awarded to the defendant. Fla. Stat. 559.77 (Before 1 July 2001). The FDCPA, on the other hand, requires a different proof which is that the complaint was brought in bad faith and for the purpose of harassment. 15 U.S.C. § 1692k(a)(3). The FDCPA further states that where conflict in the FDCPA and any State statutes exist, the provisions more protective of the consumer shall prevail. 15 U.S.C. § 1692n.

settlement talks after the Petitioner had served the collector with a written stop communications demand, (2) 15 U.S.C. § 1692e by deceiving the court and the Petitioner by continuing to attempt to collect the debt after the independent contractor's principal no longer owned the debt and thus did not have any authority to continue to collect it, and (3) 15 U.S.C. § 1692c(b) by disclosing the details of the consumer debt to Petitioner's father by causing a notice of taking Petitioner's deposition in aid of execution on the consumer debt judgment to be served, by substitute service, on Petitioner's father when service could have been had directly on the Petitioner. The fourth cause of action was (4) an alleged violation of the catch-all provision of the Florida FCCPA, Fla. Stat. 559.72(7), clause 2, based on the facts underlaying the FDCPA claims.[6]

When the collector subsequently served a copy of the county court order, which ordered Petitioner to jail upon the expiration of a purge period of sixty days, on the Petitioner's father, Petitioner attempted to file an amended complaint in U.S. District Court including this new cause of action. When the amended complaint filing failed for technical reasons not stated by the court and then not realized by the Petitioner (failure to motion the court for permission to file the amended complaint), Petitioner filed, and paid the new filing fee for, a second complaint that included the new event mentioned. The U.S. District Court summarily dismissed the second complaint when it dismissed the original complaint, and the judge did not make a Rule 11 decision regarding the second complaint apparently because he realized it was an attempt to amend based on a new, but similar, event occurring subsequent to the filing of the first complaint.

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6. The Florida Statute, unlike the FDCPA, provides for punitive damages (not limited to $1,000), a possible injunction, and a higher standard for defendant attorney's fees if the plaintiff loses the case. Fla. Stat. 559.77 (before 1 July 2001). Pet. App. 34a.

### *III. U.S. District Court Order Granting Summary Judgment in Favor of Attorney Debt Collector Defendant and Ordering Rule 11 Sanctions Against Petitioner*

In the order granting summary judgment in favor of the collector, who was the moving party, and accepting the facts alleged in the compliant as proven, the U.S. District Court found in favor of the collector as a matter of law as to each count of the complaint, and it ordered Petitioner to show cause why Rule 11 sanctions should not be ordered. Doc. 57. The court, having ruled that it was not the collector who had harassed the Petitioner but instead the Petitioner who had harassed the collector, ordered Petitioner to pay the attorney debt collector his attorney's fees of $15,382.50 and costs of $649.50, which he did.[7] Docs. 64 and 73.

Because the U.S. District Court decisions (Doc. 57 – granting summary judgment, Doc. 64 – finding rule 11 violations, and Doc. 73 – setting Rule 11 sanction amounts) (1) ruled as a matter of law against each of the FDCPA counts in Petitioner's complaint, (2) ruled that these counts were the same as those claims Petitioner raised in county court, (3) was the basis for the Florida Supreme Court's order finding that Petitioner breached his ethical duties by filing these (frivolous) counts in federal court (for the purpose of harassing Guttmann), and (4) is at the heart of the first question presented for review in this petition for a writ of certiorari, the essential part of the U.S. District Court's ruling as to each count appears below:

> As to count I of Petitioner's complaint, the court stated (Doc. 57, p. 9):

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7. The court used the "bad faith and for the purpose of harassment" standard of 15 U.S.C. § 1692k(a)(3) rather than the more stringent standard of Fla. Sta. 559.77 (before 1 July 2001) which required failure "to raise a justiciable issue of law or fact." In light of the 15 U.S.C. § 1692n, which requires the more stringent standard of the two (federal and state law) to be used, the court should have used the later or state standard.

Although settlement offers are not included in the three exceptions expressly set forth in section 1692c(c), such offers are a necessary and important aspect of the legal process. Therefore, settlement offers are always proper during litigation that is underway. Therefore, Guttmann's offer to settle the judgment against Committe was proper.

As to count II of Petitioner's complaint, the court stated (Doc. 57, p. 10:

Although Guttmann had the ability to instruct the independent process server to serve only Committe, neither the FDCPA nor Florida law required him to do so. In light of clearly established law, this is a frivolous allegation.

As to count III of Petitioner's complaint, the court stated (Doc. 57, p. 10):

The evidence in the record suggests that Guttmann engaged in efforts to collection this judgment during the time period in which the new owner of the debt, Arrow Financial, had not specifically authorized him to do so. However, Guttmann was acting under the authority of the owner of the judgement when he started and when he terminated his efforts to collect this judgment. Arrow financial purchased the judgment with the knowledge that Guttmann was attempting to collect or execute on it, and *presumably* Arrow financial confirmed the continuation of such efforts. There is no evidence in the record that he was advised to stop his legal efforts during the ten months that Arrow Financial owned Committe's obligation. Moreover, no reasonable interpretation of the record suggests that Guttmann intentionally engaged in false, misleading, or unconscionable means in attempting

> to collect execute on the judgment. [Emphasis added].

As to count I, note that the court admits that there is no exception in the statute for settlement talks. The court pulls its own exception out of thin air with no reference to any federal case law (this is usurpation of legislative power).[8] As to count II, note that the court admits that the collector had the ability to restrict service of the notice regarding the debt to Petitioner's person rather than cause substitute service of the notice on Petitioner's parent (thus, such substitute service was not necessary). As to count III, note that the court *presumes* (because there was no evidence in the record) that the purchaser of the debt had authorized the collector to continue his efforts trying to collect it on behalf of the new owner Arrow (in a motion for summary judgment all such inferences should be made in favor of the non-moving party, in this case the Petitioner).

It was a bold usurpation of the legislative power for the U.S. District Court to substitute its idea of what was harassment and abusive debt collection practices for that of the Congress which legislated the FDCPA's general provisions and its very specific and particular, and non-exhaustive, examples of harassment and abuse. As a matter of law, the Court should have denied the debt collector's motion for summary judgment based on the plain and unambiguous words in the statute, not granted it and then ordered Rule 11 sanctions against the Petitioner in part to deter other attorney's from bringing such federal law based claims.

The Florida Supreme Court's ruling, which essentially adopts the U.S. district court's Rule 11 judgment in total and

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8. At the time there was a two judge majority decision in the 6th Circuit Court of Appeals which had held that settlement talks were an exception to the "stop communications" provision of 15 U.S.C. § 1692c(c). The dissenting judge writes a strong dissent. The U.S. District Court In Petitioner's case made no reference to it. *Lewis v. ACB Business Services, Inc.*, 135 F.3d 389 (6th Cir. 1998).

notwithstanding that the standard for decisionmaking under the Florida Bar Rules is proof by evidence that is clear and convincing,[9] is the law of the land for attorneys in the State of Florida. The unwarranted adverse affect on the FDCPA plaintiffs' bar and general plaintiff federal consumer protection bar in the State of Florida is dire and unjust for U.S. Citizens whose consumer protection rights Florida Bar members seek to vindicate. In effect, what has happened is the Supreme Court of the State of Florida has found a way to trump the supremacy clause of the U.S. Constitution, Article VI, clause 2, by suspending from the practice of law Florida attorneys who bring cases based on the plain and unambiguous language of its provisions. It has for all intents and purposes struck down the application of the FDCPA to all consumer debtors in the State of Florida. No Florida attorney will ever want to bring an FDCPA case with this Florida Supreme Court ruling on the books, much less a case of first impression. There will be no development of the law in Florida for sure, and there will be a denial of the intended benefits of the existing federal law until the Florida Supreme Court decision in this case is corrected.

### *IV. U.S. Court of Appeals for the Eleventh Circuit*

Petitioner appealed to the 11th Circuit Court of Appeals the U.S. District court's decision, but the decision was affirmed in an unpublished order. *Bruce Edward Committe v. Stephen M. Guttmann*, U.S. Court of Appeals for the Eleventh Circuit, Case No. 02-11688, unpublished but referenced at 62 Fed. Appx 317 (Table).

### *V. The Florida Bar Complaint*

The collector filed a complaint with the Florida Bar not alleging any violation of any Bar rule but merely attaching to

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9. *The Florida Bar v. Varner*, 780 So.2d 1 (Fla 2001), footnote 3 therein; *The Florida Bar v. Pellegrini*, 714 So.2d 448; *See Florida Bar v. Marable*, 645 So.2d 438, 442 (Fla.1994); *Florida Bar v. McClure*, 575 So.2d 176, 177 (Fla.1991).

his complaint a copy of the U.S. District Court's decision and order of the county court committing Petitioner to jail if he did not meet the purge requirements of the county court commitment order.

The Florida Bar informed the Petitioner of the complaint filed against him and that formal proceedings had begun. The local grievance committee would meet in a grand jury type proceeding, and Petitioner should contact one of the two committee members who had been assigned to investigate the facts and present same to the local grievance committee. Contact was made with one of the members who said he had not yet familiarized himself with the case and that he would call Petitioner after he had done that. No call ever came. Instead, the Petitioner received a notice that the grievance committee (probable cause committee) would be meeting and that the Petitioner was prohibited from attending that meeting in person. A motion to dismiss based on this defect in process was denied.

Probable cause was found, apparently based on the court orders from the county court (denying motion for protective order and stay and order committing Petitioner to jail), and U.S. District Court (order granting Guttmann's motion for summary judgment and ordering Rule 11 sanctions). Counsel for the Florida Bar prepared a complaint which failed to include language from the Florida Bar Rules of Professional Conduct but instead merely cited the rules violated by their number after first setting forth facts of events which occurred in the county and U.S. District courts as well as the content of the courts' respective orders. Petitioner motioned to dismiss the complaint for insufficiency in its content, and same eventually was denied by the referee. The basis for the motion was that the complaint did not relate any facts stated therein to the content of the rules merely cited in the complaint by rule number. Although it is unethical to file a frivolous complaint,[10] a suspension from

10. Rules of Professional Responsibility. Rule 4-3.1 Meritorious Claims and Contentions. A lawyer shall not bring or defend a proceeding, (Cont'd)

practice of any length requires that the wrongdoer do so knowingly.[11] Too, it is not unethical for an attorney to refuse to obey an obligation under the rules (not appearing for a deposition) when such refusal is openly based on an assertion that no valid obligation exists (motion for a protective order).[12] Had the Bar complaint been sufficient by including the language of the rules, the prosecutor likely would have recognized no breach of the rules was even being alleged. and that it itself was a frivolous complaint.

### *VI. The Referee's Decision on the Bar Complaint*

The referee's decision pretty much restated the county court events and the language of the U.S. District Court in its orders, and announced a recommended sanction of a private reprimand. The referee failed to conduct a hearing on the issue of sanctions, and he failed to identify any facts, required by the Rules, in support of his recommended sanction. *See* Referee's findings

(Cont'd)
or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law . . . .

11. Standards for Imposing Lawyer Sanctions. Rule 6.2 Abuse of the Legal Process. Absent aggravating or mitigating circumstances, and upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving failure to expedite litigation or bring a meritorious claim, or failure to obey any obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists:

> 6.22 Suspension is appropriate when a lawyer knowingly violates a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.

12. Rules of Professional Responsibility. Rule 4-3.4(c). A lawyer shall not . . . knowingly disobey an obligation under the rules except for an open refusal based on an assertion that no valid obligation exists. Emphasis Added.

of Fact and Conclusion of Law at Pet. App. 19a. *See* Florida Supreme Court Order at Pet. App. 1a.

### *VII. Petitioner Seeks Review in the Florida Supreme Court*

Petitioner sought review of the referee's findings of fact and conclusion of law in the Florida Supreme Court where the matter underwent oral argument. Petitioner's arguments were, among others, that insufficient evidence was in the record to show that the Bar had proven unethical conduct by clear and convincing evidence (which is the standard for such Bar initiated proceedings in the Florida Supreme Court[13]) and that he was denied due process by having to respond to a Bar complaint that insufficiently informed him by failing to connect the factual allegations to the Bar rules only cited therein by number and title. The Bar filed a cross petition and for the first time ever argued for a 91 day suspension that would have required the Petitioner to take the Florida Bar Exam in order to regain the right to ask for reinstatement. This was the first time the Bar had ever recommended a sanction in this case.

The Florida Supreme Court issued an order suspending Petitioner for 90 days and setting him up[14] with a one-year suspension to follow. Before the suspension is completed, Petitioner must attend a one-half day professionalism course. The Pensacola News Journal daily newspaper reported Petitioner's suspension from the practice of law for filing the alleged frivolous complaint against the debt collector and abusing the legal process on page 6c of the 13 October 2005

13. *See* footnote 9 *supra.*

14. For all intents and purposes, Petitioner will not be able to offer his private attorney general legal services in the area regulated by the FDCPA or FCCPA because to do so would subject him not only to attack and other harassment (using the threat of filing a Florida Bar Complaint) but also to the likelihood of being disbarred in any case Petitioner ever lost. Most other consumer protection attorneys in Florida similarly now are put in extreme danger of attack such an attack because of the Florida Supreme Court's decision in this case.

issue. The Florida Bar Journal has also reported the news to all Florida attorneys and judges.

Petitioner filed a motion for rehearing which was denied on 6 December 2005.

### *VIII. U.S. Court of Appeals for the Eleventh Circuit*

The U.S. Court of Appeals for the Eleventh Circuit has issued an order for Petitioner to show cause within ten days why he should not be suspended from practicing before the Eleventh Circuit and sanctioned in similar matter as that handed out by the Florida Supreme Court in light of the latter's decision. The order states that the basis for showing of any cause shall be limited to (1) an allegation of a due process violation and (2) finding of grave injustice in the 90 day sanction. Petitioner has filed a response to the order, and the court has not yet issued a decision. *In Re Bruce Edward Committe*, In the U.S. Court of Appeals for the Eleventh Circuit, Misc. Case No. 06-1002.

This Petition for a Writ of certiorari followed.

## REASON FOR GRANTING THE PETITION

The Court should grant the writ because (1) the Florida Supreme Court's order suspending Petitioner from the practice of law causes the effect of trumping the U.S. Constitution's supremacy clause (Article VI, clause 2) by denying all U.S. citizens residing in Florida the protections afforded them by the clear, unambiguous, and plain language of the federal Fair Debt Collections Practices Act and (2) in making its decision the Florida Court has misstated dicta in *Heintz v. Jenkins*, 514 U.S. 291, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995) as the holding of the case and then applied that misstated holding to reach a result that denies U.S. citizens in Florida their rights per the FDCPA.

## I. The Florida Supreme Court Decision To Suspend the Petitioner From the Practice of Law Essentially Denies All U.S. Citizens Residing in Florida Access to the Federal and Florida Courts To Vindicate Their FDCPA Rights

Although this is an appeal of a Florida Supreme Court's ethics ruling in the matter of a single attorney acting as a pro se party in his own interest as well as a private attorney general zealously[15] employing the consumer protection provisions of the FDCPA in effect on behalf of all Florida consumer debtors, because the ruling court is the highest court in the State of Florida and its decision publicly suspends an attorney from the practice of law with a one year probationary period to follow, it has the impact of denying all U.S. citizens in Florida all of their rights under the FDCPA.[16]

The ruling is a clear message to the consumer protection law bar in Florida that zealously representing consumer debtors under the FDCPA will not be tolerated in Florida. It has the widespread effect of denying all U.S. citizens residing in Florida their right under the FDCPA (1) to be free of the fear of debt

15. In all of the proceedings below, an attorney's affirmative duty to represent his client zealously has never been mentioned by any of the courts or tribunals involved in the case. In section 4, Preamble – A Lawyers Responsibilities, appears the statement: "As an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." Rules 4-3.1, Meritorious claims and Contentions, describes a lawyers obligation as to what not to do (not file nonmeritorious and frivolous claims) rather than what to do (zealously represent your client's interests): "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. . . ." In the Bar complaint against the Petitioner, this language was not used. Only the rule number and title are used in the Bar complaint.

16. A motion to stay the suspension while seeking a writ of certiorari from the U.S. Supreme Court was denied.

collection *harassment* and *abuse*, as those terms are defined by the U.S. Congress and (2) to receive zealous representation by an attorney in vindicating those rights when an attorney debt collector, or non-attorney debt collector, violates them.[17] This concern is even more important than before because the recent amendments to the U.S. Bankruptcy laws makes it more expensive and difficult for consumer debtors to file bankruptcy and obtain protection from creditors and debt collectors by that deleterious route.

If the only concern in the bringing of this appeal was the bad FDCPA decision of the U.S. District Court in this case based on its incorrect application of the FDCPA, then the case would not be appropriate for granting a writ. The court rarely grants petitions when the error consists of mere misapplication of a properly stated rule of law. U.S. Supreme Court Rule 10. After all, it is not the purpose of the U.S. Supreme Court to correct all errors, even all serious errors, of U.S. District Courts, U.S. Courts of Appeals, or even the highest court in each state. Usually, conflicts among the U.S. Circuit courts of appeal as to ruling case law or among the highest court of a State and one or more of the Circuit Courts of Appeals is the basis for a writ being granted by this Court.

But in this case, the error by the Florida Supreme court is a gross error that severely punishes an attorney who dared to bring forward an FDCPA case of first impression as to at least four factual circumstances each of which entitled him to judgment in his favor. The error does not just affect consumer rights under the FDCPA but denies all U.S. citizens in Florida their right to have an attorney zealously represent their interests against attorney debt collectors and pretty much in any other area of

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17. As mentioned above, the Florida Supreme Court decision has been reported in the Southern Reporter 2d series and in the Pensacola news Journal daily newspaper: *The Florida Bar v. Bruce Edward Committe*, 916 So.2d 741 (Fla 2005); Pensacola News Journal, 13 October 2005, local Section, Page 6c.

both civil and criminal law. The Petitioner attorney in this case did not just lose his case, he lost his right to practice law in the Florida (and federal) Courts and will suffer a one year probation set-up thereafter.[18] For all intents and purposes he can not practice, either zealously or otherwise, FDCPA consumer plaintiff law ever again because defense attorney's will regularly (if they indeed are zealously representing their clients' interests) use the threat of disbarment to adversely affect Petitioner's FDCPA plaintiff clients' interests in every case he handles. The reported suspension and probation will severely discourage and deter other Florida attorney's from representing plaintiff clients in FDCPA cases. A similar effect will occur with respect to all federal consumer protection law plaintiff cases.

## II. The Florida Supreme Court's Decision Misstates This The U.S. Supreme Court's Holding In *Heintz v. Jenkins* And Then Uses The Misstatement To Create a Conflict With The True Holding.

A glaring error in the Florida Supreme Court's ruling that should be corrected is that court's gross misstatement of the holding of the U.S. Supreme Court in its 1995 FDCPA decision in *Heintz*. The U.S. Supreme Court twice stated its holding in that case. On page 1490, 292:

> The issue before us is whether the term "debt collector" in the Fair Debt Collection Practices Act, 91 Stat. 874, 15 U.S.C. §§ 1692-1692o (1988 ed. And Supp. V), applies to a lawyer who "regularly," *through litigation*, tries to collect consumer debts. The Court of Appeals for the Seventh Circuit held

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18. Probation is a "set-up" in this case because the likelihood of the Bar finding a future violation is very high in light of the Bar being able to find by clear and convincing evidence a violation in the case at bar where an attorney received such a harsh punishment for merely filing a pleading based on the plain facts and the plain and unambiguous language of the FDCPA.

> that it does. We agree with the Seventh Circuit and we affirm its judgment.

On page 1493, 298:

> For these reasons, we agree with the Seventh Circuit that the Act applies to attorneys who "regularly" engage in consumer-debt-collection activity, even when that activity consists of litigation. Its judgment is therefore *Affirmed.*

The Florida Supreme Court, on the other hand and in support of that part of its decision which rules that the FDCPA does not apply to attorneys engaged in litigating activities, such as depositions, misidentifies dicta in *Heintz* as the holding of *Heintz* and then uses the misstatement to rule that Petitioner's FDCPA filings were frivolous:

> Committe's claims revolve around his often-repeated contention that the FDCPA "stop communications" clause allows him to stop all communications with an attorney debt collector, including attending a deposition. This is contrary to the record evidence and the *holding* of *Heintz v. Jenkins,* 514 U.S. 291 (1995), of which Committe was aware before he filed his federal suits. Specifically, in *Heintz,* an attorney debt-collector argued that the term "debt collector" in the FDCPA does not apply to attorneys, in part because if it did, it would create an anomaly in the law since an attorney would never be able to file a lawsuit against a nonconsenting consumer in light of the fact that 15 U.S.C. § 1692c(c) (1988) requires a "'debt collector' not to 'communicate further' with a consumer who 'notifies' the 'debt collector' that he or she 'refuses to pay' or wishes the debt collector to 'cease further communication.' *Heintz,* 514 U.S.

at 296. The United States Supreme Court rejected this argument. (Emphasis added).

> We agree with *Heintz* that it would be odd if the Act empowered a debt-owing consumer to stop the "communications" inherent in an ordinary lawsuit and thereby cause an ordinary debt-collecting lawsuit to grind to a halt. But, it is not necessary to read 1692c(c) in that Way–if only because that provision has exceptions that permit communications "to notify the consumer that the debt collector or creditor may invoke" or "intends to invoke" a "specified remedy" (of a kind "ordinarily invoked by [the] debt collector or creditor"). 1692c(c)(2), (3). Courts can read these exceptions, plausibly, to imply that they authorize the actual invocation of the remedy that the collector "intends to invoke." The language permits such a reading, for an ordinary court-related document does, in fact, 'notify' its recipient that the creditor may "invoke" a Judicial remedy. Moreover, the interpretation is consistent with the statute's apparent objective of preserving creditors' judicial remedies. *We need not authoritatively interpret the Act's conduct-regulating provisions now, however.* Rather, we rest our conclusions upon the fact that it is easier to read 1692c(c) as containing some such additional, implicit, exception than to believe that Congress intended, silently and implicitly, to create a far broader exception, for litigating attorneys, from the Act Itself. [Emphasis

> added by Petitioner as proof that the remarks are dicta, not a holding of the U.S. Supreme Court].

*Heintz*, 514 U.S. at 296-97. *The Florida Bar v. Bruce Edward Committe*, 916 So.2d 741, 747 (Fla 2005).

The holding above as stated by The Florida Supreme court is not the holding of *Heintz* but instead is the dicta of *Heintz*. The U.S. Supreme Court should at this time resolve the matter of the above dicta because, as has happened in this case, at least one lower court has used it as a basis not for merely ruling against a party and imposing Rule 11 sanctions regarding the meaning of the statute but for suspending an attorney from practicing law in the courts. And this wrongful use was based on a wrong decision of the U.S. District Court which the U.S. Eleventh Circuit Court of Appeals affirmed. Resolving the application of the FDCPA to litigating attorney debt collectors should not be that difficult. See paragraph immediately below.

Exemption of attorney's from the requirements of the FDCPA was removed several years after the FDCPA and 15 U.S.C. § 1692c(c) were enacted, and no reason exists why attorney's who do not meet the FDCPA's definition of "debt collector" could not give notice of, and conduct, the consumer debtor's deposition. Thus, upon reflection, there indeed is nothing odd at all about an attorney debt collector being prohibited from conducting a debtor's deposition in aid of execution of an outstanding judgment against him because attorneys who are not debt collectors could conduct the deposition. And, if a debt collector wishes not to have § 1692c(c) invoked against him (the provision is active only when affirmatively invoked by the debtor) to stop all of his communications with the debtor, he or she can simply not engage in conduct that would make the debtor want to make the invocation or else he or she could negotiate the non-invocation with the debtor. Many other alternatives exist as well.

## III. The Second and Third Question Presented for Review Are Ancillary to the First Question Presented for Review

The arguments made above for granting the writ primarily are with respect to the first question presented for review which focuses on the FDCPA. The second and third questions presented for review (lack of notice in the Bar Complaint and failure of the referee fact finder to provide a fact based sanctions hearing) both regard the lack of due process in the refereed proceedings before the Florida Supreme Court. The lack of due process is a likely explanation for how the Florida Supreme Court obtained a decision which effectively denies Florida U.S. citizens their consumer protection rights per the FDCPA and conflicts with *Heintz*. The purpose of due process in part is to increase the likelihood that the tribunal's decision will be correct or consistent with the substantive law. Its lacking in this case was a significant contributing factor to creating the conflict with *Heintz*, and thus questions II and III are worthy of the Court's attention and decision.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

## APPENDIX A — PER CURIAM ORDER OF THE SUPREME COURT OF FLORIDA DATED OCTOBER 12, 2005

**SUPREME COURT OF FLORIDA**

No. SC03-1203

**THE FLORIDA BAR,**

Complainant/Cross-Respondent,

vs.

**BRUCE EDWARD COMMITTE,**

Respondent/Cross-Complainant.

[October 12, 2005]

PER CURIAM.

We have for review a referee's report regarding alleged ethical breaches by Bruce Edward Committe. We have jurisdiction. *See* art. V, § 15, Fla. Const.

### I. FACTS

On July 8, 2003, The Florida Bar filed a one-count complaint against Bruce Edward Committe, alleging that he knowingly failed to comply with legally proper discovery requests, filed two frivolous federal lawsuits, and abused the legal process. The referee's findings follow.

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On July 16, 1993, attorney William E. Gardner obtained a money judgment against Committe in Arlington, Virginia, in the amount of $4,527.21 plus interest. The judgment was domesticated and recorded in Pensacola, Florida, where it was referred to a local collection agency, Collection Services, Inc. (CSI). CSI, in turn, referred the case to attorney Stephen M. Guttmann, who appeared in the debt collection suit against Committe on June 11, 1998. Guttmann issued a notice of taking deposition with a subpoena duces tecum to Committe to appear on June 24, 1998. Within days, Committe moved for a protective order, claiming that the deposition was "burdensome" because he had prior plans to be out of state. Committe's motion included alternative dates when he was available. Relying on these alternative dates, Guttmann filed an amended notice of taking deposition and subpoena, rescheduling the deposition for June 18, 1998.

The day before the deposition was to be taken, Committe filed a second motion for a protective order based on the Fair Debt Collection Practices Act (FDCPA). In his motion, he claimed that Guttmann was a "debt collector" under the statute, and the FDCPA prohibited Guttmann from taking his deposition since he had been notified in the motion to "cease communication" with Committe. Committe, believing that his motion acted as a stay, did not appear at the deposition pursuant to the subpoena duces tecum. Guttmann set Committe's motion for a hearing before Judge G.J. Roark, III, who denied it. Specifically, Judge Roark found that, although Guttmann was a "debt collector" under the statute, the FDCPA did not prohibit him from engaging in the litigation activity of a deposition in aid of execution on a money judgment. On August 22, 1998, Committe filed a

motion for rehearing, citing to *Heintz v. Jenkins,* 514 U.S. 291, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995), as grounds for reversing Judge Roark's prior ruling. Guttmann set the motion for rehearing before Judge Roark, who denied the motion.

Guttmann filed a third notice of taking deposition and subpoena duces tecum, setting Committe's deposition for August 2, 1999. Committe failed to appear, but instead, on the day of the deposition, he filed a third motion for protective order, alleging that he needed to appeal Judge Roark's decision to deny his motion for rehearing. Guttmann then filed a motion for contempt for failure to appear pursuant to the notice of taking deposition and subpoena. On October 22, 1999, Judge Roark held Committe in contempt of court for failure to comply and sentenced Committe to sixty days in jail for contempt. Committe, however, was given thirty-five days to purge the contempt by complying with the terms of the order, including appearing for a deposition on November 22, 1999.

On October 15, 1999, while the motion for contempt in the county court action was pending, Committe filed a federal court action against Guttmann and Gardner, claiming over $3 million in damages based on alleged violations of the FDCPA and the Florida Consumer Collection Practices Act (FCCPA). On October 20, 2000, while the first federal case was still pending, Committe filed a second complaint against Guttmann, with similar allegations but adding another allegation regarding substitute service of process. Committe filed a Chapter 7 bankruptcy petition, in which he stated that his federal lawsuit against Guttmann had a market value of

$1000, despite the fact that his federal suit claimed over $3 million in damages. On November 16, 1999, Committe proposed to settle his federal lawsuit against Guttmann for a total of $4500. On June 15, 2001, Judge Roger Vinson granted summary judgment to Guttmann in the first federal lawsuit, finding that Committe's action amounted to "an abuse of legal process." He noted that in light of Committe's conduct in the state court proceedings and the fact that his two federal actions raised the same frivolous claims, Committe's intent was to harass Guttmann. Further, Judge Vinson held that Committe's case was "brought in bad faith" and sua sponte ordered Committe to show cause why rule 11 sanctions[1] should not be imposed. In a separate order, dated December 18, 2001, Judge Vinson found that rule 11 sanctions were warranted and ordered Committe to pay Guttmann his "reasonable fees and costs as a sanction for his bad faith in filing this frivolous action."[2] Committe appealed Judge Vinson's order, but the Eleventh Circuit Court of Appeals affirmed the lower court's decision granting summary judgment and imposing rule 11 sanctions.

During the proceedings before the referee, Committe testified that he had substantial experience in filing claims under the FDCPA and FCCPA and that he had almost five years of prior legal experience in this particular field before he filed the two federal lawsuits against Guttmann. After listening to all of the testimony and reviewing the evidence,

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1. *See generally* Fed.R.Civ.P. 11.

2. The federal court later determined this amount to be $15,382.50 for attorney fees and $649.50 for costs.

the referee found that Committe's two federal lawsuits were frivolous and that he lacked a statutory basis or prevailing case law to support his claims. The referee also found that Committe "knowingly and intentionally failed to comply with a legally proper discovery request by Mr. Guttmann by failing to appear for his deposition" and had no reasonable grounds for failing to appear. The referee explicitly found that Committe abused the legal process by filing two federal actions in order to harass Guttmann for his attempts to collect a money judgment. The referee concluded that Committe violated Rules Regulating the Florida Bar 4-3.1 (meritorious claims and contentions), 4-3.4(c) (knowingly disobey an obligation under the rules of a tribunal), 4-3.4(d) (failure to comply with a legally proper discovery request), 4-8.4(a) (violation of bar rules), and 4-8.4(d) (conduct prejudicial to the administration of justice).

In assessing his recommended discipline, the referee found that three aggravating circumstances applied: Committe engaged in a pattern of misconduct; he committed multiple offenses; and he had substantial experience in the law. He also noted in mitigation that Committe had no prior disciplinary record, made a full disclosure, and was cooperative in the disciplinary proceedings. After balancing these factors, the referee recommended that Committe receive a private reprimand. Committe filed a petition for review in this Court, arguing among other things that there was no competent and substantial evidence that he violated any Bar rule. The Florida Bar filed its answer and cross-petition, contending that the referee's recommended discipline was insufficient and that the Bar should be entitled to its costs.

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## II. ANALYSIS

### Preliminary Motions

Committe first claims that the grievance committee meeting of The Florida Bar violated section 286.011, Florida Statutes (2003), because Committe was not allowed to attend the meeting, no public notice was given, and no transcript of the meeting was recorded. The grievance committee meetings of the Bar are private, and therefore the Bar is justified in prohibiting Committe from attendance. *See* R. Regulating Fla. Bar 3-7.1(a)(1). Given that The Florida Bar is "an official arm of the court," *see* R. Regulating Fla. Bar, Introduction, this Court has previously rejected the Legislature's power to regulate which Florida Bar files were subject to public records law, holding that "[n]either the legislature nor the governor can control what is purely a judicial function." *Fla. Bar re Advisory Opinion,* 398 So.2d 446, 447 (Fla.1981) (holding that public records law did not apply to unauthorized practice of law investigative files maintained by The Florida Bar); *see also Locke v. Hawkes,* 595 So.2d 32 (Fla.1992). Moreover, the Bar rules regarding confidentiality are protected by the constitution. Article I, section 24(d), of the Florida Constitution, which grants access to public records and meetings, specifically provides that "[r]ules of court that are in effect on the date of adoption of this section that limit access to records shall remain in effect until they are repealed." In this case, rule 3-7.1 was in effect years prior to the constitutional right to access public records and meetings. Hence, we reject Committe's argument that the Bar rules regarding confidentiality violated section 286.011(1), Florida Statutes (2003).

In this same argument, Committe claims that two members of the grievance committee were "commanded" to discuss the investigation with him, which they failed to do. To the extent that Committe alleges that this denied him due process, his argument must fail. Due process was met because Committe was served with notice of the Bar's charges and was afforded an opportunity in the disciplinary hearing to be heard and defend himself. *See, e.g., Fla. Bar v. Rubin,* 709 So.2d 1361, 1363 (Fla.1998) ("Prior to being found guilty of the charges at issue here, Rubin was afforded appropriate notice and a full opportunity to be heard during the final hearing before the referee. This was sufficient to satisfy the demands of due process.").

**Sufficiency of the Referee's Report**

In his second claim, Committe contends that the Bar's complaint was insufficient because the complaint failed to connect each allegation to a specific rule, and this failure prevented him from preparing an effective defense. We disagree and find that the Bar complied with rule 3-7.6(h)(1)(B), which requires only that the Bar "set forth the particular act or acts of conduct for which the attorney is sought to be disciplined." There is no requirement for the Bar to connect every alleged item of misconduct to a specific rule violation. The Bar's complaint specifically addressed what conduct it relied upon to show Committe violated his professional obligations. It is the combination of these acts that led to the conclusion that Committe violated the rules. As addressed above, due process is satisfied where the attorney has notice and an opportunity to be heard. *See, e.g., Fla. Bar v. Fredericks,* 731 So.2d 1249, 1254 (Fla.1999)

("Accordingly, because Fredericks was made aware of the conduct alleged by the Bar to be unethical and had the opportunity to be heard as to this conduct, there was no violation of due process."). In fact, Committe's very response demonstrates that he was adequately informed and had an opportunity to be heard, given the strenuous arguments he presented to both the referee and this Court as to why he believed his acts did not violate any ethical rules.

**Findings of Fact**

Committe claims that there is no competent, substantial evidence to support the referee's findings that he violated the Bar rules, making a repetitive argument that his conduct was legal. In reviewing this type of claim, the Court has set forth the appropriate standard of review as follows:

> A referee's findings of fact regarding guilt carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. *Florida Bar v. Vannier,* 498 So.2d 896, 898 (Fla.1986). Absent a showing that the referee's findings are clearly erroneous or lacking in evidentiary support, this Court is precluded from reweighing the evidence and substituting its judgment for that of the referee. *Florida Bar v. MacMillan,* 600 So.2d 457, 459 (Fla.1992). The party contending that the referee's findings of fact and conclusions as to guilt are erroneous carries the burden of demonstrating that there is no

> evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions.

*Fla. Bar v. Spann*, 682 So.2d 1070, 1073 (Fla.1996). Committe cannot meet this burden by simply pointing to contradictory evidence when there is also competent, substantial evidence in the record to support the referee's findings. *Fla. Bar v. Nowacki*, 697 So.2d 828, 832 (Fla.1997). Committe has not met this burden.

As found by the referee, after Guttmann attempted to depose Committe, Committe filed a motion for protective order raising his FDCPA claim in state court, which was denied. He then filed a motion for rehearing, which was also denied. Guttmann attempted to take Committe's deposition for a third time and set the date for August 2, 1999. On the date the deposition was scheduled to be taken, Committe failed to appear and filed his third motion for protective order, relying only on his claim that this was necessary because he needed to appeal the decision relating to the rehearing. When this course of action was not successful, Committe filed two successive claims in the federal district court, again raising the same claim which was already unsuccessful in state court. In the federal action, Committe sought over $3 million; however, when he filed bankruptcy, he admitted that his claim had no such value by stating this lawsuit had a market value of only $1000. United States District Judge Vinson denied all of Committe's claims in an order granting summary judgment to Guttmann, explicitly finding that Committe filed the federal action in order to harass Guttmann and that his action amounted to "an abuse of the legal process." Committe

was experienced in this area of the law and should have been aware that his claims lacked a good-faith basis in law. Committe does not address the successive nature of his actions but instead reargues the merits of his claims, asserting that he had a proper legal foundation for all of his claims because he was merely trying to develop the law in this area.

Committe's claims revolve around his often-repeated contention that the FDCPA "stop communication" clause allows him to stop all communications with an attorney debt collector, including attending a deposition. This is contrary to the record evidence and the holding of *Heintz v. Jenkins*, 514 U.S. 291, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995), of which Committe was aware before he filed his federal suits. Specifically, in *Heintz*, an attorney debt-collector argued that the term "debt collector" in the FDCPA does not apply to attorneys, in part because if it did, it would create an anomaly in the law since an attorney would never be able to file a lawsuit against a nonconsenting consumer in light of the fact that 15 U.S.C. § 1692c(c) (1988) requires a "'debt collector' not to 'communicate further' with a consumer who 'notifies' the 'debt collector' that he or she 'refuses to pay' or wishes the debt collector to 'cease further communication.'" *Heintz*, 514 U.S. at 296, 115 S.Ct. 1489. The United States Supreme Court rejected this argument as follows:

> We agree with Heintz that it would be odd if the Act empowered a debt-owing consumer to stop the "communications" inherent in an ordinary lawsuit and thereby cause an ordinary debt-collecting lawsuit to grind to a halt. But, it is not necessary to read § 1692c(c) in that way-if only

> because that provision has exceptions that permit communications "to notify the consumer that the debt collector or creditor may invoke" or "intends to invoke" a "specified remedy" (of a kind "ordinarily invoked by [the] debt collector or creditor").§§ 1692c(c)(2), (3). Courts can read these exceptions, plausibly, to imply that they authorize the actual invocation of the remedy that the collector "intends to invoke." The language permits such a reading, for an ordinary court-related document does, in fact, "notify" its recipient that the creditor may "invoke" a judicial remedy. Moreover, the interpretation is consistent with the statute's apparent objective of preserving creditors' judicial remedies. We need not authoritatively interpret the Act's conduct-regulating provisions now, however. Rather, we rest our conclusions upon the fact that it is easier to read § 1692c(c) as containing some such additional, implicit, exception than to believe that Congress intended, silently and implicitly, to create a far broader exception, for all litigating attorneys, from the Act itself.

*Heintz*, 514 U.S. at 296-97, 115 S.Ct. 1489. The referee was clearly bothered by this same problem, questioning Committe on the record as to why Committe believed that there was a justiciable issue of fact or law for the federal lawsuits based on the plain holding in *Heintz*. Committe responded by asserting that the above reasoning stated in *Heintz* was merely dicta and thus had no authoritative value. Again, Committe misses the point. Presenting such an argument once or

moving for a rehearing is one thing. In this case, Committe argued the same ground numerous times, and when he was not successful in state court, he filed two federal suits raising the same previously denied claims. Moreover, his actions in filing a claim for $3 million in damages against Guttmann and then admitting his claim was worth only about $1000 further supports the referee's finding that Committe's intention in filing the federal claims was merely to harass Guttmann.

Committe claims that prosecuting him for the filing of these FDCPA lawsuits would have a chilling effect on other attorneys. This claim is without merit. This Court denied a similar claim in *Florida Bar v. Richardson,* 591 So.2d 908 (Fla.1991):

> Neither the Bar nor this Court wishes to stifle innovative claims by attorneys. Nevertheless, under the rules of professional conduct, the pursuit of imaginative claims is not without limit. The standard embodied in rule 4-3.1, requiring a good-faith argument for the extension, modification, or reversal of existing law, is broad enough to encompass those cases where the claims are the result of innovative theories rather than, as here, an obsessive attempt to relitigate an issue that has failed decisively numerous times. The federal court in this case specifically found this claim to be frivolous and malicious.

*Id.* at 910-11.

In the case at hand, the referee found that these multiple attempts to relitigate this same nonmeritorious and frivolous issue were without a good-faith basis in the law. Moreover, the referee found these pleadings were filed for the *purpose* of harassing Guttmann. Although Committe attempts to show that the referee's findings were unsupported by the record, mostly relying on his testimony before the referee and his argument that some court could find his arguments plausible, he has failed to meet his burden in showing that the findings are "clearly erroneous." *See, e.g., Spann,* 682 So.2d at 1073. The record is full of competent and substantial evidence to support this finding, including Committe's own pleadings and the federal judge's written findings which reached the same conclusion and even imposed rule 11 sanctions sua sponte. Accordingly, we adopt the referee's findings of fact and recommendations as to guilt.

**Cross-Appeal**

The Bar filed a cross-appeal, contending that the referee's recommended discipline was too lenient and that a ninety-one-day suspension is the appropriate level of discipline. In reviewing the referee's recommendation as to discipline, this Court's scope of review is somewhat broader because this Court has the ultimate responsibility to order the appropriate sanction. *Fla. Bar v. Lawless,* 640 So.2d 1098, 1100 (Fla.1994). The sanction resulting from a Bar disciplinary proceeding must be fair to society, fair to the attorney, and severe enough to deter other attorneys from similar misconduct. *Id.* As a general rule, when evaluating a referee's recommended discipline, the Court will not second-guess a referee's recommended discipline as long as that discipline

(1) is authorized under the Florida Standards for Imposing Lawyer Sanctions (Standards), and (2) has a reasonable basis in existing case law. *Fla. Bar v. McFall,* 863 So.2d 303, 307 (Fla.2003). For the following reasons, we agree that the referee's recommendation for a private reprimand is too lenient[3] but decline to impose a ninety-one-day suspension.

First, the referee's recommended discipline is contrary to the standards. Specifically, standard 6.2 sets forth the appropriate standards for abuse of the legal process:

> **6.22** Suspension is appropriate when a lawyer knowingly violates a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.
>
> **6.23** Public reprimand is appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.
>
> **6.24** Admonishment is appropriate when a lawyer negligently fails to comply with a court order or rule, and causes little or no injury to a party, or causes little or no actual or potential interference with a legal proceeding.

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3. A private reprimand is now termed an admonishment and is only appropriate where this Court finds an attorney's misconduct to be "minor." R. Regulating Fla. Bar 3-5.1(b); Fla. Stds. Imposing Law. Sancs. 2.6; *Fla. Bar v. Kramer,* 593 So.2d 1040, 1041 (Fla.1992).

In this case, the referee did not find that the abuse of legal process was based on a negligent act. Instead, the referee explicitly found Committe "knowingly and intentionally failed to comply with a legally proper discovery request" and "knowingly failed to obey the rules of civil procedure by failing to appear at his third scheduled deposition." He also found that Committe abused the legal process by filing "two nonmeritorious and frivolous federal lawsuits for the purpose of harassing Mr. Guttmann" and by "failing to appear and filing motions for protective orders on what he should have known were frivolous grounds." The two federal lawsuits clearly harmed Guttmann because they were filed for the purpose of harassment and further caused Guttmann to hire an attorney to defend the suits. Since Committe's acts were intentional and knowing and, further, since he caused injury or potential injury to a party, suspension is the presumed discipline.

A suspension is likewise supported by prior case law. In *Florida Bar v. Richardson*, 591 So.2d 908 (Fla.1991), which consisted of two different Bar proceedings both arising from the same facts, an attorney was suspended after engaging in similar misconduct. In the first proceeding, while Richardson represented the personal representative in a probate proceeding, the judge determined that Richardson's fee was excessive. Richardson appealed that decision, arguing that the judge lacked jurisdiction because the payment was made by the personal representative and not the estate. The district court found the argument to be without merit and ordered a calculation of the reimbursement of the excessive fee to the estate. *Id.* at 909. After the calculation by the trial court, Richardson appealed again. The second appeal was

dismissed as untimely, and Richardson was suspended for ninety-one days in a Bar proceeding for his excessive fee charge. *Id.* After Richardson unsuccessfully sought two writs of mandamus from this Court, he then filed a federal complaint in the United States District Court for the District of Columbia, stating that his civil rights were violated because the trial judge ruled without jurisdiction. The federal court granted the defendant's motion to dismiss and imposed rule 11 sanctions on Richardson, finding that the "complaint [was] both manifestly frivolous and malicious." *Id.* at 910. This Court held that a private reprimand was insufficient and instead imposed a sixty-day suspension for his frivolous filings.

Similarly, Committe attempted to relitigate an issue that failed numerous times for the purpose of harassment. Both Richardson and Committe filed frivolous federal lawsuits claiming absurd damage amounts and were sanctioned under rule 11. The decisions are factually similar with the one exception being that Richardson was previously disciplined for acts stemming from the same isolated incident, while Committe was disciplined for the entirety of his actions in one proceeding.

Committe repeatedly attempted to relitigate the same nonmeritorious issue in an attempt to frustrate the legal process and to harass a attorney debt-collector who had every legal right to depose him. All during this time, Committe offered to settle these frivolous claims for pennies on the dollar and valued these claims at next to nothing in his own bankruptcy proceeding. His knowledge of the frivolous nature of his lawsuits makes his conduct even more unprofessional.

Perhaps even more troubling to this Court is that even now, Committe appears to not understand the basic obligations imposed on attorneys. Upon review of all of the facts, the standards, and prior case law, we find a ninety-day suspension to be the appropriate level of discipline, to be followed by a one-year probation. *See Richardson*, 591 So.2d at 911. Prior to the expiration of his probation, Committe must complete The Florida Bar's practice and professionalism enhancement program entitled, "Professionalism Workshop."

**Costs**

In the final claim of the cross-petition, the Bar contends that the referee should have awarded it costs since it prevailed. The Bar failed to file an affidavit of costs with the referee, and hence the report failed to include any findings or recommendations as to costs, contrary to rule 3-7.6(k)(1)(E). Accordingly, this Court remanded this portion of the report to the referee. The referee has now submitted a supplemental report stating that respondent has stipulated that the Bar reasonably incurred costs of $4,252.55, as set forth in the Bar's affidavit filed with the Court on April 14, 2004.

## III. CONCLUSION

Based on the above, we approve the referee's findings of fact and recommendations as to guilt but reject the recommended discipline and instead impose a suspension. Bruce Edward Committe is hereby suspended from the practice of law for ninety days, to be followed by a one-year probation. Further, during this time, Committe shall complete

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The Florida Bar's practice and professionalism enhancement program, "Professionalism Workshop." The suspension will become effective thirty days from the date of this opinion so that Committe can close out his practice and protect the interests of existing clients. If Committe notifies this Court in writing that he is no longer practicing and does not need the thirty days to protect existing clients, this Court will enter an order making the suspension effective immediately. Committe shall accept no new business from the date this opinion is filed until the suspension is completed. Judgment is entered for The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, for recovery of costs from Bruce Edward Committe in the amount of $4,252.55, for which sum let execution issue.

It is so ordered.

PARIENTE, C.J., and WELLS, ANSTEAD, LEWIS, QUINCE, CANTERO, and BELL, JJ., concur.

## APPENDIX B — THE REFEREE'S FINDINGS OF FACT AND CONCLUSIONS OF LAW DATED APRIL 2, 2004

**IN THE SUPREME COURT OF FLORIDA**
**(Before a Referee)**

Case No. SCO3-1203

TFB File No. 2002-01,100(1A)

THE FLORIDA BAR,

Complainant,

v.

BRUCE EDWARD COMMITTE,

Respondent.

### THE REFEREE'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

***Findings of Fact***

1. Respondent is, and at all times material to the Complaint was, a member of The Florida Bar since May 9, 1989, subject to the jurisdiction of the Supreme Court of Florida.

2. On July 16, 1993, a money judgment was obtained against Respondent in Arlington, VA, by attorney William E. Gardner in the amount of $4,527.21 plus interest.

3. The judgment was domesticated and recorded in Pensacola, Florida, as Escambia County Court Case No. 94-215-CC-12, Division II, *Security Pacific Executive/ Professional Services v. Bruce Committe* where it was referred to a local collection agency, Collection Services, Inc. ("CSI").

4. CSI referred the case to attorney Stephen M. Guttman to collect on Security Pacific's money judgment against Respondent.

5. Mr. Guttmann appeared in the debt collection suit for Security Pacific on June 11, 1998, and issued a notice of deposition with a subpoena duces tecum in aid of execution to Respondent to appear on June 24, 1998.

6. Prior to that date, on June 15, 1998, Respondent filed a motion for a protective order claiming the deposition was "burdensome" because he had prior plans to be out of state, and proposed alternative dates when he was available.

7. Relying on the alternative dates listed in Respondent's motion, Mr. Guttman filed an amended notice of deposition and subpoena rescheduling Respondent's deposition for June 18, 1998.

8. On June 17, 1998, however, Respondent filed a second motion for a protective order based on the Fair Debt Collection Practices Act ("FDCPA") [15 U.S.C. § 1692 et seq.], claiming that Mr. Guttmann was a "debt collector" under the statute, and having been notified in the motion to

"cease communication" with Respondent, the FDCPA prohibited Mr. Guttmann from taking his deposition in aid of execution on the money judgment.

9. Respondent's second motion for protective order relied on the FDCPA as "good cause" asserting that the federal law prevented Mr. Guttmann from taking his deposition in aid of execution on the money judgment because it prohibited Mr. Guttmann from communicating with him once he had invoked the "cease communication" rule of the FDCPA in his motion. See 15 U.S.C. § 1692c©).

10. Respondent did not have time to set his second motion for protective order for hearing before the deposition date, and believing that his motion acted as a stay, did not appear at the deposition pursuant to the subpoena duces tecum served by Mr. Guttmann.

11. Mr. Guttmann set Respondent's second motion for protective order down for hearing on July 23, 1998.

12. In an Order dated August 19, 1998, Judge Roark denied Respondent's second motion for a protective order finding that, while Mr. Guttmann was a "debt collector" under the Act and Respondent had informed him to "cease communication" regarding his consumer debt, the FDCPA did not prohibit an attorney from engaging in the litigation activity of a deposition in aid of execution on a money judgment.

13. On August 22, 1998, Respondent filed a motion for rehearing, citing to *Heintz v. Jenkins,* 115 S. Ct. 1489 (1995) as grounds for reversing Judge Roark's prior ruling.

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14. Mr. Guttmann set the motion for rehearing on May 12, 1999, before Judge Roark who again denied Respondent's motion based on the argument that the FDCPA prevented Mr. Guttmann from taking his deposition in aid of execution on Respondent's money judgment.

15. The county court having ruled twice that the FDCPA did not prohibit the litigation activity of taking a deposition in aid of execution on a money judgment, Mr. Guttmann filed a third Notice of Taking Deposition in Aid of Execution and a Subpoena Duces Tecum, and had it served personally on Respondent setting his deposition for August 2, 1999.

16. On the date of the deposition, Respondent filed a third motion for protective order and stay alleging as "good cause" that he needed to appeal Judge Roark's decision on his motion for rehearing, and failed to appear pursuant to the subpoena duces tecum.

17. On October 9, 1999, Mr. Guttmann served Respondent with a motion for contempt for failure to appear pursuant to the notice of deposition and subpoena.

18. On October 22, 1999, Judge G. J. Roark III held Respondent in contempt of court for failure to comply with a subpoena duces tecum to appear at his deposition in aid of execution on the money judgment.

19. Judge Roark sentenced Respondent to 60 days in jail for contempt, but gave Respondent 35 days to purge the contempt by complying with the terms of his Order, including appearing for his deposition on November 22, 1999.

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20. On October 15, 1999, while Mr. Guttmann's motion for contempt in the county court action was pending, Respondent filed a federal court action against Mr. Guttmann and Mr. Gardner in the U.S. District Court, Northern District of Florida, Pensacola Division, Case No 3:99cv 426/RV, with a total damage claim of over $3 million.[1]

21. Respondent alleged that Mr. Guttmann and Mr. Gardner had violated the FDCPA, and the Florida Consumer Collection Practices Act ("FCCPA") (Fla. Stat. § 559.55 et seq.).

22. While this federal case was pending, Respondent filed a second complaint against Mr. Guttmann on October 20, 2000, styled as *Bruce Edward Committe v. Stephen M. Guttmann,* Case No. 3:00cv464/RV with similar allegations but adding another allegation regarding substitute service of process.[2]

23. Respondent filed a Chapter 7 bankruptcy petition on November 2, 1999, in order to stay the county court proceedings, including the contempt commitment order and the deposition in aid of execution, in which he stated that his federal lawsuit against Mr. Guttmann had market value of $1,000.

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1. Mr. Gardner was dropped as a co-defendant, and Respondent proceeded solely against attorney Guttman in this case.

2. On May 22, 2001, the federal court granted Mr. Guttmann's motion to strike and summarily dismissed Respondent's second complaint.

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24. On November 16, 1999, Respondent sent a letter to Mr. Guttmann's attorney and proposed that the federal lawsuit be settled for a total of $4500 paid in return for Respondent filing a notice of voluntary dismissal.

25. At the 941 creditors' meeting in Respondent's bankruptcy case on August 1, 2000, Respondent admitted to the bankruptcy trustee and to Mr. Guttmann that the market value of the first federal lawsuit Respondent filed against Mr. Guttmann was in fact $1,000.

26. On June 15, 2001, Judge Vinson granted summary judgment to Mr. Guttmann in the first federal lawsuit, stating that Respondent's action amounted to "an abuse of legal process," that Respondent's claims were "frivolous," and that Respondent's clear intent was "to harass" Mr. Guttmann.

27. Further, Judge Vinson held that Respondent's case was "brought in bad faith" and *sua sponte* ordered Respondent to show cause why Rule 11 sanctions should not be imposed.

28. Judge Vinson also ordered Respondent to pay Mr. Guttmann's "reasonable fees and costs as a sanction for his bad faith in filing this frivolous action."

29. In a separate order dated February 21, 2002, the federal court ordered Respondent to pay Mr. Guttmann $15,382.50 for attorney's fees, and $649.50 for costs for violation of Rule 11 of the Federal Rules of Procedure.

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30. Respondent filed an appeal of Judge Vinson's June 15, 2001, Order with the Eleventh Circuit Court of Appeals.

31. On February 13, 2003, The Eleventh Circuit Court of Appeals affirmed the lower federal court's decision granting summary judgment to Mr. Guttmann, and imposing Rule 11 sanctions on Respondent.

32. Respondent testified that he had substantial experience in filing claims under the FDCPA and FCCPA since 1991. Respondent has practiced law in Florida since 1994 and a large part of his legal practice consists of representing plaintiff debtors with possible FDCPA claims against debt collectors. Respondent had almost five years of prior legal experience in this particular field before he filed the two federal lawsuits against Mr. Guttmann.

33. Respondent's filing of two federal lawsuits against Mr. Guttmann was frivolous because Respondent had no reasonable "good faith" basis in law or in fact for the reasons stated in Judge Vinson's Order granting summary judgment and imposing Rule 11 sanctions, and the Order granting defendant's motion to strike the complaint, as well as in the decision of the Eleventh Circuit Court of Appeals.

34. Respondent had no statutory basis under the FDCPA or FCCPA to support his factual allegations in the federal lawsuits against Mr. Guttmann.

35. The prevailing case law also did not support Respondent's claims in the federal lawsuits against Mr. Guttman.

*Appendix B*

36. Respondent knowingly and intentionally failed to comply with a legally proper discovery request by Mr. Guttmann by failing to appear for his deposition pursuant to a subpoena duces tecum in the county court collection action on August 2, 1999.

37. Respondent also knowingly failed to obey the rules of civil procedure by failing to appear at his third scheduled deposition pursuant to a subpoena duces tecum.

38. Respondent had no reasonable grounds for failing to appear pursuant to Mr. Guttmann's third notice of deposition and subpoena duces tecum. Respondent had notice and ample time prior to the third deposition date to file a motion for a protective order and set it for hearing before the court to obtain an order before failing to appear pursuant to the deposition notice and a subpoena duces tecum.

39. Respondent's filing of two nonmeritorious and frivolous federal lawsuits for the purpose of harassing Mr. Guttmann who was attempting to collect a money judgment for his client is an abuse of legal process and prejudicial to the administration of justice.

40. Respondent's second motion for protective order was also frivolous and prejudicial to the administration of justice because the exceptions contained in the FDCPA did not prevent Mr. Guttmann from engaging in the litigation activity of taking Respondent's deposition. See 15 U.S.C. § 1692(c)(2)(3), *Heintz v. Jenkins*, 115 S.Ct. 1489 @ 1491 and 1492 (1995); *Lewis v. ACB Business Services*, 135 F.3rd 389 (6th CCA 1998).

*Appendix B*

41. Respondent's conduct in the county court case to obstruct the discovery process by failing to appear and filing motions for protective orders on what he should have known were frivolous grounds, is an abuse of the legal process and is conduct prejudicial to the administration of justice.

42. Respondent's letter to Mr. Gardner on July 26, 1999, claiming a violation of the FDCPA and FCCPA was prejudicial to the administration of justice because Respondent threatened to sue Mr. Gardner if he didn't pay him, and then when Mr. Gardner ignored his letter, Respondent filed suit against him in November 1999.

***Conclusions of Law***

For the foregoing reasons, the referee finds that Respondent has violated the following Rules Regulating The Florida Bar, to wit: 4-3.1 (Meritorious Claims and Contentions), 4-3.4(c) (Knowingly disobey an obligation under the rules of a tribunal), 4-3.4(d) (Failure to comply with a legally proper discovery request), 4-8.4(a) (Violation of Bar Rules), and 4-8.4(d) (Conduct Prejudicial to the Administration of Justice).

The following aggravating and mitigating factors apply under the Florida Standards for Imposing Lawyer Sanctions:

Aggravating: (c) pattern of misconduct; (d) multiple offenses; (i) substantial experience in the law

Mitigating factors: (a) no prior disciplinary record; (e) full disclosure to the disciplinary board and co-operative attitude towards proceedings.

*Appendix B*

***Recommendation***

The Respondent should receive a private reprimand.
DATED this 2 day of April 2004.

Respectfully submitted,

MICHAEL C. OVERSTREET
Referee

## APPENDIX C — ORDER OF THE SUPREME COURT OF FLORIDA DENYING MOTION FOR REHEARING DATED DECEMBER 6, 2005

**SUPREME COURT OF FLORIDA**
TUESDAY, DECEMBER 6, 2005

**CASE NO.:** SCO3-1203
Lower Tribunal No.: 2002-01,100(1A)

THE FLORIDA BAR

Complainant/Cross-Respondent

vs.

BRUCE EDWARD COMMITTE

Respondent/Cross-Complainant

Respondent/Cross-Complainant's Motion for Rehearing, First Amended Motion for Rehearing and Motion for Clarification are hereby denied.

PARIENTE, C.J., and WELLS, ANSTEAD, LEWIS, QUINCE, CANTERO and BELL, JJ., concur.

A True Copy
Test:

*Appendix C*

bhp Served:

MAUREEN DUIGNAN
ALAN B. BOOKMAN
JOHN ANTHONY BOGGS
OLIVIA PAIVA KLEIN
BRUCE EDWARD COMMITTE
HON. MICHAEL C. OVERSTREET, JUDGE

## APPENDIX D — FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND RELEVANT STATUTES INVOLVED

### U.S. CONSTITUTION

Fourteenth Amendment, Due Process Clause, Section 1

Nor shall any state deprive any person of life, liberty, or property, without due process of law.

Article VI, Clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made under the authority of the United States, and the Judges shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

### U.S. STATUTES

15 U.S.C. § 1692c(b)

Except as provided in section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a post judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor or the attorney of the debt collector.

*Appendix D*

15 U.S.C. 1692c(c)

If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt, except –

(1) to advise the consumer that the debt collector's further efforts are being terminated;

(2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or

(3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.

If such notice from the consumer is made by mail, notification shall be complete upon receipt.

15 U.S.C. 1692(d)

For the purpose of this section, the term "consumer" includes the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator.

*Appendix D*

15 U.S.C. 1692e

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt.

15 U.S.C. 1692k(a)(3)

On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

15 U.S.C. 1692n

This subchapter does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency. For purpose of this section, a State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection provided by this subchapter.

*Appendix D*

## FLORIDA STATUTES

Fla. Stat. 559.72(7), clause 2 (Before 1 July 2001)

In collecting consumer debts, no person shall . . . (7) Wilfully engage in other conduct which can reasonably be expected to abuse or harass the debtor or any member of his family.

Fla. Stat. 559.77

The court may, in its discretion award punitive damages and may provide such equitable relief as it deems necessary or proper, including enjoining the defendant from further violations of this part. If the court finds that the suit fails to raise a justiciable issue of law or fact, the plaintiff shall be liable for court costs and reasonable attorney's fees incurred by the defendant.

## *Appendix D*

Fla. Stat. 559.72(7), clause 2 (before 1 July 2001) (partial)

In collecting consumer debts, no person shall. . . . willfully engage in other conduct which can reasonably be expected to abuse or harass the debtor or any member of her or his family.

Fla. Stat. 559.77 (before 1 July 2001) (partial)

. . . Upon adverse adjudication, the defendant shall be liable for actual damages or $500, whichever is greater, together with court costs and reasonable attorney's fees incurred by the Plaintiff. The court may, in its discretion, award punitive damages and may provide such equitable relief as it deems necessary or proper, including enjoining the defendant from further violations of this part. If the court finds that the suit fails to raise a justiciable issue of law or fact, the plaintiff shall be liable for court costs and reasonable attorney's fees incurred by the defendant.